No. 87-1310

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

EAST KENTUCKY ENERGY CORPORATION, ONEIDA COAL COMPANY, INC. and SHAMROCK COAL COMPANY, INC.,

Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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QUESTIONS PRESENTED

The respondent respectfully disagrees with the petitioner's presentation of the questions raised in its Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia and feels that the following more fairly represents the question for review:

1. May a County Tax Assessor use information from recent deed values to determine the true and actual value of property without violating the guarantee of equal protection in the Fourteenth Amendment to the Constitution of the United States?

2. Whether the State of West Virginia's remedy that taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced as long as their property is valued at market value, instead, they should seek to have the assessments of other taxpayers raised to market value, violates the equal protection in the Fourteenth Amendment to the Constitution of the United States.

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COUNTY COMMISSION OF WEBSTER COUNTY,

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATEMENT OF THE CASE

West Virginia, like 39 other States and thousands of local governments throughout the Country, imposes an ad valorem tax on the ownership of real property within its jurisdiction. Since the amount of the tax levied is based on the value of the property, it is necessary to ascertain the value of the different parcels of property owned in the State. In West Virginia and many other jurisdictions responsibility for that task rests, in the first instance, with the county assessor.

Once the county assessor establishes the actual value of the particular parcels of property—the "appraised value"—he applies an appropriate percentage—50 percent in West Virginia—to arrive at the "assessed value." The tax is then levied as a percentage of the assessed value of the property. There is no issue in this case concerning discriminatory tax levies or the application of discriminatory assessment percentages. There is no issue in this case that the appraised value exceeds the true and actual or market value of subject property.

Petitioner, East Kentucky Energy, owns 7,374 acres of property in Webster County, West Virginia. Petitioner, Oneida, owns some 7,783 acres of property in Webster County previously owned by its sister corporation, petitioner, Shamrock. East Kentucky Energy purchased its property from Allegheny-Pittsburgh Coal Company in 1982 for some $30 million. Shamrock purchased the Oneida-Shamrock property in 1977 for some $5.9 million. The tax assessor for Webster County relied exclusively upon there purchase prices in arriving at the appraised value of petitioners' property for the years at issue, and then took 50 percent of the appraised value to arrive at the assessed value. East Kentucky Energy's property was thus taxed on the basis of an assessed value of some $15 million, and Oneida-Shamrock's on the basis of an assessed value of some $3 million.

The Assessor for Webster County, West Virginia for the aforesaid period of time, and in accordance with the policy of that office, assessed all real estate that was subject to a recent transfer based upon fifty percent of the

value contained in the declaration of consideration of value of the deed, without exception.

In addition to the assessment of real property that had transferred with a declaration of consideration of value, the Assessor raised the assessed values of properties that had not undergone a recent transfer by ten per cent in 1976, 1981 and 1983, in an attempt to raise assessments of nontranferred real property so as to meet the equal and uniform provision of the U. S. Constitution and the W. Va. Constitution.

The Assessor for Webster County, West Virginia assessed all personal property at fifty percent of its true and actual value during the period in question.

The Assessor for Webster County, West Virginia assessed property in each class in the aforesaid manner, applying uniformly to all classes of property within the County, the methodology of assessment.

Petitioners sought review of their assessments in the Webster County Circuit Court "on the grounds that the assessments violated the equal and uniform clause of article X, section 1 of the West Virginia Constitution, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

According to the evidence, there are approximately thirty two million tons of coal recoverable by the strip mining method alone on the subject tracts owned by East Kentucky Energy, and this estimate is based on proven reserves. (Appendix A, p. 22a).

The Circuit Court of Webster County, West Virginia found in its order of November 22, 1985 that there were

numerous other tracts within the area of the subject tracts that were assessed at a value substantially less than the assessed value of Allegheny Pittsburgh/East Kentucky Energy, while the value of Allegheny Pittsburgh/East Kentucky Energy was $1,688.64 per acre from 1976 through 1983 and $2,043.00 per acre from 1984 through 1986. (Petitioner's Appendix p. 21a).

No evidence was ever adduced at the hearings held before the Board of Equalization and Review as to the market conditions of the adjoining comparable tracts, as to the proven reserves upon those tracts, nor was any evidence ever adduced as to the true and actual value of the adjoining comparable tracts.

The Circuit Court of Webster County, West Virginia found by final order entered on December 13, 1985 that the assessment of the Allegheny Pittsburgh/East Kentucky Energy property was in violation of the equal and uniform clause of Section 1, Article X of the West Virginia Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The Circuit Court of Webster County, West Virginia ordered that the appraised value of the fee and coal tracts of the subject property of East Kentucky Energy be $360.00 per acre, with an assessed value of sixty (60) percent of $360.00 per acre or $216.00 per acre.

The Circuit Court of Webster County, West Virginia ordered that the appraised value of the surface tracts of the subject property be $300.00 per acre with an assessed value of $180.00 per acre.

Based upon the order of the Circuit Court of Webster County, West Virginia as aforesaid, the total appraised values of the subject tracts is $2,893,117.90, with an assessed value of $1,735,869.00.

The County Commission appealed the Circuit Court orders to the Supreme Court of Appeals of West Virginia, the State's highest court, and the various cases were consolidated for purposes of appeal. On July 17, 1987, the Supreme Court issued a per curiam opinion reversing the Circuit Court and ordering reinstatement of the assessments previously set by the County Commission. The Supreme Court concluded that the consideration recited in petitioner's deeds reflected the true and actual value of petitioners' property, that the record does not support the trial Court's ruling that the actions of the assessor and board of review constitute "intentional and systematic" discrimination. The assessments based upon the price paid for the property in arm's length transactions are an appropriate measure of the "true and actual value" of appellees' property.

The uniform use of recent deed values as the basis for appraising property subject to ad valorem taxation does not violate the equal and uniform provision of the Constitution of West Virginia or the United States.

The decision of the West Virginia Supreme Court, according to the judgment duly entered indicated that Chief Justice McGraw, Justices Neely, Miller, and McHugh concurred in the decision with Justice Brotherton, dissenting and would affirm the trial judge. (Petitioner's Appendix B, p. 2a).

Such judgment was affirmed when the West Virginia Supreme Court denied the petitioner's request for a rehearing. (Petitoner's Exhibit C, p. 14a).

———o———

REASONS FOR REFUSING THE WRIT

This Court has adopted a properly deferential standard in reviewing claims of discriminatory taxation and has granted to the States broad leeway in handling of tax matters and the administration of the same, especially where the only issue is an allegation of equal protection.

The case presents no substantial federal question as to denial of equal protection for this Court's review and the decision of the West Virginia Supreme Court is consistent and in accordance with the principles pronounced in *Leggitt v. Lee*, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed.2d 929 (1933) as to remedies available to taxpayers who believe other property may be underassessed.

———o———

ARGUMENT

I. MAY A COUNTY TAX ASSESSOR USE INFORMATION FROM RECENT DEED VALUES TO DETERMINE THE TRUE AND ACTUAL VALUE OF PROPERTY WITHOUT VIOLATING THE GUARANTEES OF EQUAL PROTECTION IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

As the West Virginia Supreme Court of Appeals in its opinion in this case stated: "The present case is somewhat analogous to those situations where an assessors makes a partial reappraisal of property which results in such property receiving a higher value than other property or there is a disparate valuation between tax districts. *Courts have rather uniformly rejected equal protection and uniformity of taxation arguments in such cases.* (Emphasis own) (Petitioner's Appendix A, p. 10a).

The West Virginia Supreme Court in the case of *Kline v. McCloud,* 326 S.E.2d 715 (W. Va. 1984) extensively reviewed decisions of various jurisdictions dealing with the equality and uniformity issues stated, commencing at page 720:

> "Our research discloses very few cases dealing with this precise issue. In *Meyer v. Cuyahoga County Bd. of Revision,* 58 Ohio St.2d 328, 390 N.E.2d 796 (1979), a local board of education filed a petition with the county board of tax revision to have the Meyers' real estate reassessed to reflect its 1973 purchase price of $120,000. The propertys' value had been established at $3,410 by the county auditor's 1970 sexennial appraisal. The board of revision increased the value to $120,000.

The Meyers argued on appeal that using the purchase price rather than the sexennial appraisal figure violated equal and uniform taxation principles because other homeowners' properties were valued according to the sexennial appraisal.

The Supreme Court of Ohio noted prior cases in which it had "rather consistently held that the best evidence of true value is the actual sale price of the property in an arm's length transaction." 58 Ohio St.2d at 333, 390 N.E.2d at 799. The Court went on to address the unequal taxation issue arising from the Meyers' claim that other property owners' values were based on the sexennial appraisal rather than deed sales, quoting from *Southern Ry. Co. v. Watts*, 260 U.S. 519, 526, 43 S.Ct. 192, 195, 67 L.Ed. 375, 387 (1923):

The rule is well settled that a taxpayer although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others . . . But, unless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause."

See also *Shaw v. Bd. of Revision of Cuyahoga County*, 70 Ohio St.2d 255, 436 N.E.2d 1033 (1982).

Finding no intentional and systematic discrimination, the Court in Meyer refused to grant any relief, giving this general summary: The system of taxation unfortunately will always have some inequality and nonuniformity attendant with such governmental function. It seems that perfect equality in taxation would be utopian, but yet, as a practicality, unattainable. We must satisfy ourselves with a principle of reason that practical equality is the standard to be applied in these matters, and this standard is satisfied when the tax system is free of systematic and intentional departures from this principle." 58 Ohio St.2d at 335, 390 N.E.2d at 800.

The use of sale prices in reappraising property was also challenged on uniformity of taxation grounds in *Merlino v. Tax Assessors for Town of N. Providence*, 114 R.I. 630, 337 A.2d 796 (1975). In that case, the assessed value of plaintiffs' house was increased from $12,300 to $18,900 when they purchased it in 1972. They argued that this increase was unconstitutional because there had not been a general revaluation of property in their community since 1960, and property which had not been sold since then had not been reassessed.

The Court held that the plaintiffs could not make out a cause of action unless they could show that there had been a "systematic, intentional undervaluation of the property in the locality." 114 R.I. at 639, 337 A.2d at 802. This burden was not met merely by showing that other properties in the same area were not revalued in 1972. Instead, they had to show "that a substantial amount of property was taxed at a lower percentage of fair market value than their property." id. Since they failed to meet this burden, the Court denied relief.

The present case is somewhat analogous to those situations where an assessor makes a partial reappraisal of property which results in such property receiving a higher value than other property or there is disparate valuation between tax districts. Courts have rather uniformly reflected equal protection and uniformity of taxation arguments in such cases. In *Spooner v. Akew*, 345 So.2d 1055 (Fla. 1976), for instance, the court refused to accept an equal protection argument where taxpayers in one county claimed their property was valued higher than the property in other counties.

In *In Re Hawaiian Land Co.*, 53 Hawaii 45, 487 P.2d 1070 (1971) appeal dismissed sub nom. *Hawaiian Land Co. v Director of Taxation, State of Hawaii*, 405 U.S. 907, 92 S.Ct. 938, 30 L.Ed2d 778 (1972), an

assessor selected certain properties to be valued annually while others were valuated every two or three years. The annually valuated taxpayer claimed this resulted in a higher assessment on its property and constituted violation of equal protection and uniform taxation, but the Court rejected this argument. The Idaho Supreme Court found no equal protection or uniform taxation problem where piecemeal reappraisals were made over a period of time with property being assessed at the new appraisal figure instead of waiting until all property had been reappraised. *Justus v. Bd. of Equalization*, 101 Idaho 743, 620 P.2d 777 (1980). This same result was reached in *Recanzone v. Nevada Tax Comm'n.*, 92 Nev. 302, 550 P.2d 401 (1976). See also *Melvin v. Dunn*, 607 P.2d 694 (Okla. 1980); *State ex rel. Fort Howard Paper Co. v. State of Wisconsin Lake District Bd. of Review*, 82 Wis.2d 491, 263 N.W.2d 178 (1978); Annot., 76 A.L.R.2d 1077 (1961).

Further, this Court has held that "The States have a very wide discretion in the laying of their taxes. When dealing with the proper domestic concerns, and not thereby upon the prerogatives of the National Government or violating the guarantees of the Federal Constitution, the States have attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. Of course, the States, in the exercise of their taxing powers, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment, but that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of taxation. The State may impose different specific taxes upon different trades and professionals and may vary the rate of excise upon various products. It is not required to resort to close distinctions

or to maintain a precise, scientific uniformity with reference to composition, use or value. *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 526-527, 79 S.Ct. 437, 440-441, 3 L.Ed.2d 480, 486 (1955), *Lahnhauser v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351, 354-55 (1973).

Further, this Court has stated "where taxation is concerned and no specific federal right, apart from equal protection, is implied, the States have large leeway in making classifications and drawing lines in which their judgment produce reasonable systems of taxation. *Lehnhauser v. Lake Shore Auto Parts Co., supra,* 410 U.S. at 359, 93 S.Ct. at 1003, 35 L.Ed.2d at 351.

The actions by the County Assessor in this case is clearly in conformity with the principles previously enunciated herein.

The evidence is undisputed that the County Assessor found the true and actual value of the property based upon the declaration of consideration of value and that the Assessor equally and uniformly applied a rate of fifty to the appraised value. (Petitioner's Appendix A pp. 4a-5a).

There is further absolutely no dispute that the valuation of the property was based on the true and actual value of the property of the petitioners. In fact, the petitioners concede in their petition filed herein that the price paid was an appropriate measure of the property value. (Petitioner's Petition at page 14-15).

The value being proper, the uniform use of declaration of consideration of purchase price paid in deed transactions, is not violative of the equal and uniform provision

of the Fourteenth Amendment to the United States Constitution.

Further, the West Virginia Supreme Court specifically held that the actions by the County Assessor were not an intentional and systematic discrimination against the petitioners and therefore would not be in violation of this Court's holding in *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441 (1923) that there must be an intentional violation of the essential violation of practical uniformity.

The evidence in this record reveals that the petitioner fails to come within the principles enunciated in *Sioux City Bridge Co. v. Dakota County (supra)* for two reasons.

First, the evidence adduced at the trial level, fails to prove that there are any other properties situated in Webster County, West Virginia of the same value of the petitioners that are underassessed. The petitioners have purchased a very valuable tract of coal property.

In the record, the evidence adduced at the hearing before the Board of Equalization and Review, held on February 12, 1985, the testimony of the expert, *Mullanex, for East Kentucky Energy testified that other tracts in the area have the same geological strata but that he did not have any proven reserves as to those "comparable tracts."* (Emphasis own). Mullanex further testified that the reserves are proven on the East Kentucky Energy properties and that there were at *least thirty two million tons of coal recoverable by the strip mining method alone.* (Emphasis own) (Appendix A, p.21a). Anyone knows that coal properties which have proven reserves are of a much greater value than coal properties with unproven reserves.

None of the protesting taxpayers offered competent testimony through appraisers, experts or the like as to the true and actual values of *the comparable tracts and that these tracts were not assessed at true and actual value.* The statistical data submitted by the protesting taxpayers was a *mere compilation* of the values on the land books *without regard* to the *location, topography, accessibility* or *other factors* that may affect market value. (Emphasis own).

With the record being void of such evidence, the petitioners claim of denial of equal protection must fail.

Secondly, the record is void of any evidence of a systematic and intentional discrimination toward the petitioners on any class that the petitioners are a member of. There is absolutely no evidence that there was a different rate or a different methodology in arriving at the value of the petitioners' property.

The West Virginia Supreme Court found, which finding was supported by the evidence, that "It was the policy of the assessors office during the relevant time period to access all recently transferred property on the basis of 50 percent of the declaration of consideration of value. There appears to be no dispute that this method was uniformly followed for all such property."

In addition to that, the County Assessor took action to raise the valuation of property which had not been recently conveyed by raising the values by ten percent in the years 1976, 1982 and 1984 and the Supreme Court so found (Petitioner's Appendix A at 6a.)

Therefore, the petitioners have failed to prove any intentional and systematic discrimination against them.

II. WHETHER THE STATE OF WEST VIRGINIA'S REMEDY THAT TAXPAYERS WHO CLAIM THAT THEY ARE BEING OVERASSESSED IN RELATION TO OTHER TAXPAYERS MAY NOT HAVE THEIR ASSESSMENTS REDUCED AS LONG AS THEIR PROPERTY IS VALUED AT MARKET VALUE, INSTEAD, THEY SHOULD SEEK TO HAVE THE ASSESSMENTS OF OTHER TAXPAYERS RAISED TO MARKET VALUE, VIOLATE THE EQUAL PROTECTION IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The respondents strongly disagree with the petitioner's assertion that the lower Court's holding that "taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced as long as their property is valued at market value. Instead, they should seek to have the assessments of other taxpayers raised to market value," was critical to the lower Court's holding and assert that the assessments by the County Assessor are equal and uniform as applied to all properties throughout the taxing district.

Nevertheless, the respondents do agree that it is the settled law of the State of West Virginia that if a taxpayers property is assessed at market value, if the taxpayer believes that other property is not assessed at market value, his remedy is to compel the other assessments to be raised and he is not entitled to have it lowered.

As cited in the petitioner's petition (at page 25), many jurisdictions have followed this principle as to the relief to which the taxpayer is entitled.

Such relief is entirely proper and in accordance with the principles enunciated by this Court in its holding in

Leggett v. Lee, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed.2d 929 (1933).

In the words of Mr. Justice Roberts: "Under the law of Florida, every unity for the taxpaying public has an interest in having all property subject to taxation legally assessed, and may in behalf of himself and others in like situations require that all property subject to taxation be placed on the tax books and bear its proportionate part of the expense of government. The appellants, if they deem the tax illegally omitted in certain cases, may apply for a writ of mandamus to compel the taxing officials to do their duty. *State ex rel. Dofnos Corp. v. Lehman et al.*, 100 Fla. 1401, 131 So. 333 (1930). Failure to collect the tax from some whose occupations fall within the provisions of the act cannot excuse the appellants from paying what they owe. And certainly the remedy afforded by state law assures them equal treatment along with all others similarly situated."

Accordingly, such a remedy is not violative of the equal protection clause of the Fourteenth Amendment.

———o———

CONCLUSION

For the foregoing reasons, this Court should refuse the petition for writ of certiorari, thus affirming the judgment of the Court below.

Respectfully submitted,

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APPENDIX A

IN THE COUNTY COMMISSION OF
WEBSTER COUNTY, WEST VIRGINIA

IN RE: TAX ASSESSMENTS AGAINST EASTERN KENTUCKY ENERGY CORPORATION FOR 1985

The following proceedings were had before the County Commission of Webster County, West Virginia, sitting as a Board of Review and Equalization, on the 1st and 12th days of February, 1985.

APPEARANCES

FRANK AYERS, JOE ADAMS and E. M. COOL, Commissioners of the County Court of Webster County, West Virginia.

JACK ALSOP, Prosecuting Attorney of Webster County, West Virginia.

CALLAGHAN, CALLAGHAN, RUCKMAN & VAUGHAN, (Mr. Dan O. Callaghan, appearing), counsel for Eastern Kentucky Energy Corporation.
JOHN L. CAMPBELL, Certified Court Reporter.

* * *

(p. 71) as a Board of Equalization and Review of the 1985 taxes.

RONALD MULENEX, a witness called on behalf of the Petitioner, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CALLAGHAN:

Q Would you state your name, please?

A Ronald Mullenex.

Q And how old are you, Mr. Mullenex?

A Thirty-five.

Q Where do you live?

A Bluefield, West Virginia.

Q By whom are you employed?

A Geological Consulting Services, Incorporated.

Q How long have you been in that business?

A Eight years.

Q What is the purpose of Geological Consulting Services, Incorporated?

A Well, we evaluate coal properties, explore and evaluate mineral properties and specifically coal properties.

Q Okay, do you do coal mapping?

A Yes, sir.

Q And do you explore coal properties?

A Yes.

Q And do you value coal properties?

(p. 72) A Yes.

Q What is your training?

A Well, I've got a bachelor and masters degree in geology from West Virginia University and I have been working as a geologist for over ten years, in the coal end of geology.

Q Okay, after you first graduated from college where did you first go to work?

A I worked for the West Virginia Geological Survey for two and a half years and then Geological Consulting Services.

Q And what type of services or work did you do with the West Virginia Geological Survey?

A I was involved in mapping of coal seams and determining resources, particularly coal seams in West Virginia.

Q And where were you stationed?

A Well, I was stationed initially in Morgantown and then in the southern part of the state.

Q When did you join Geological Consulting Services?

A In 1977.

Q Are you a certified professional geologist?

A Yes.

Q Explain what that means.

A Well, it is not really licensing, but it is a certification, a nationwide certification, through a professional organization. It is not a requirement but the acceptance into (p. 73) the membership and being certified depends a lot on your qualifications and your ethic conduct.

Q Do you have to take an examination to be certified?

A No, it's not really an examination.

Q Do you have to take any examination for certification for your work?

A No, it is based on experience and to a large degree on your illustrated competency over years of experience and your ethical conduct.

Q What societies do you belong to?

A I'm a member of the Geological Society of America and the Geological Mining Institute and the American Society of Professional Geologists.

Q Have you authored or co-authored any books or publications?

A Yes.

Q Would you list those for us, please?

A One was the depositional trends of the Pocahontas number three coal seams and another was entitled cross strike structures of the central Appalachians and another was the use of depositional models for defining new coal resources in the Appalachian region, or something close to that.

MR. CALLAGHAN: Now, I would offer Mr. Mullenex as a duly qualified expert in the field of geology to testify in (p. 74) this matter. Mr. Alsop, do you wish to cross-examine Mr. Mullenex on his qualifications?

MR. ALSOP: No.

BY MR. CALLAGHAN:

Q All right, Mr. Mullenex, have you had occasion to map and do studies of the property of Eastern Kentucky

Energy Corporation located in Glade District of Webster County?

A Yes.

Q You actually prepared a map in which we have formerly marked for identification as Exhibit A?

A Yes.

Q Is that a copy of Exhibit A that now hangs on the blackboard?

A Yes.

Q Is that the map you prepared?

A Yes.

Q Would you step down and point out to the Court the property owned by Eastern Kentucky Energy Corporation?

A It is the area shown in green on this map. There are two colors, green and yellow, and the green area is the Eastern Kentucky Energy property. The yellow areas are adjacent properties that are comparable.

MR. ALSOP: I am going to object to that. There is not sufficient foundation laid for him to testify that those are (p. 75) comparable properties.

BY MR. CALLAGHAN:

Q Have you conducted studies to determine if in fact these are comparable properties?

A Well, I have conducted studies on the Eastern Kentucky Energy property and I also have done studies

on one of the adjacent properties, but certainly not on all of them.

Q But you have made a determination, have you not, that these properties —

MR. ALSOP: Mr. Callaghan, you are leading the witness.

BY MR. CALLAGHAN:

Q Have you determined —

MR. CALLAGHAN: I can do that, Mr. Alsop. There are no formal rules of evidence here.

BY MR. CALLAGHAN:

Q Have you determined that these properties marked in yellow are comparable geologically to the properties of Eastern Kentucky Energy?

A Geologically they are comparable.

Q Now, wait a minute. Have you made the determination?

A I have regarding particularly one of those.

Q All right, can you state, are you prepared to state within a reasonable degree of scientific certainty that these properties marked in yellow on this map are comparable (p. 76) properties geologically?

A Yes.

Q And you so state?

A Yes.

Q Now, explain to us what studies you made to make that determination?

A Well, as I said we have conducted reserve studies on Eastern Kentucky Energy's property here at another point in time. I have also been involved in the study of this adjacent property.

Q Would you please identify that adjacent property?

A This is 3-Q-1 property.

Q Okay, tell us how you arrived at a conclusion that they are in fact comparable.

A Can I use this?

Q Have you prepared another map that you want to use in your testimony?

A Yes.

Q And is this the map that you have prepared?

A Yes.

MR. CALLAGHAN: I would ask the reporter to mark this as Exhibit A-1.

THEREUPON, the exhibit was marked as requested.

BY MR. CALLAGHAN:

(p. 77) Q Mr. Mullenex, would you please describe what Exhibit A-1 is?

A This is a map showing coal seam distribution on Eastern Kentucky Energy's property, which is the green area here and it is outlined in orange on this one. The scales are different, but the property is the same. The

property shown in yellow on Exhibit A are outlined in yellow on A-1 on this map. The colored areas pertain to areas where certain coal seams occur within that property. There is a little schematic profile section over here on the side of the exhibit and it keys to colors and cross sections back to what is shown on the map. In other words, this area at the top is the area that is underlaid by Freeport coal and that corresponds, the pink color corresponds to this area here, which is a mountain top appearing on the Eastern Kentucky Energy property, which the Freeport coal is under that area. That is under the pink area. Then you have the upper, the middle and the lower Kittaning seams, which appear below the Freeport. You will notice once you get below that the rest of this area has been left white because from our studies on the property we have determined that there are no mineable coal seams below the last area that is colored here.

Q All right, would you please identify the colors and what seams they represent?

(p. 78) A Okay. The pink area refers to the area where the Freeport coal is present. The purple area is where the upper Kittaning coal is present. The bluish-green color is where the middle Kittaning seam occurs and the green is where the seam that was identified as the lower Kittaning seam in the old West Virginia Geological Survey map.

Q And what is the source of that map?

A This map itself comes from the State Tax Department. It is a Webster County mineral identification map, showing where the coal seams occur.

Q Did you use that map in your studies of the Eastern Kentucky Energy properties and the other properties that you have marked in yellow?

A Yes, it is used to show you roughly where the coal seams occur. It is rather generalized, but it is used for exhibit purposes.

Q All right, what other sources have you investigated to make the determination which you did?

A Well, the other sources would include all the information that has been collected and put together by the West Virginia Geological Survey. They mapped the entire county back in the teens. As I said, our company has done work on adjacent properties, adjacent to Eastern Kentucky, as a separate study and not part of the Eastern Kentucky study.

(p. 79) Q All right, you may take your seat again. Now, Mr. Mullenex, based upon your education and your educational background and based upon your experience as a geologist and based upon the studies you have made of the Eastern Kentucky Energy property and the surrounding properties in yellow, can you state within a reasonable degree of scientific certainty that these properties are comparable geologically?

A Yes.

MR. ALSOP: I'm going to object to that question. I think that is a hypothethical question that calls for a conclusion and relies on facts that are not in evidence. Mr. Mullenex has stated that the only property which he has done any study on, adjacent properties, was in fact 3-Q-1, and that he has not done any work on any other properties

and further he has not laid a proper foundation as to any type of studies that he has done on Eastern Kentucky property to give that opinion. Therefore, I object to the question.

BY MR. CALLAGHAN:

Q Mr. Mullenex, in making your conclusion did you base it upon all the things I have just recited to you?

A Well, yes. We have actually done drilling on the Eastern Kentucky property and on another property. We are talking about 3-Q-1, where I've actually had access to logs of bore hole records and I have found the same seams to occur (p. 80) basically on both properties. As a matter of fact there are a couple of seams that appear on the 3-Q-1 property that is shown as mineable, but from the information that we have from drilling are not mineable on Eastern Kentucky's property. In addition to the four seams that are shown there in that profile section, there are a lot of other named seams, horizon seams, present on all the properties in the area, but not all of those seams are going to be mineable at any given point. In fact, the seams that are shown there are not mineable throughout Eastern Kentucky's property but only a part of them. As far as comparing this area with the surrounding property, geologically, those same seams are present on all the other properties and that is what the exhibit shows. If you go into the properties that are highlighted in yellow you see the same colors occurring there. The same coal seams are present there. On one of them I have done studies on which seams are actually mineable. I haven't done that on all of them, but I know that the coal is there and I know that the chances of them being mineable are

just as good there as they are on these properties that we are talking about. And further, there are other seams that could be mineable that are not mineable on the Eastern Kentucky property.

Q And you so state with a reasonable degree of scientific certainty?

(p. 81) A Yes. There may be some variations, depending on which individual seam is mineable from one property to the other, but in the long run they are very similar properties located within the same area and there is no geological reason that they should not be comparable.

Q Now, these properties, I believe, I will hand you now what has been marked as Petitioner's Exhibit B and ask you if these are the actual lists of properties keyed to the map that you prepared?

A Yes, Exhibit A.

Q Let us go down through them one by one. 3-Q-1 is identified on both Exhibit B and also identified on the map. Is that correct?

A Yes.

Q Would you step down and go to the map and identify them?

A Okay.

Q Now, the second tract identified is 4-Q-13, the Dorsey Carpenter tract, and would you point that out?

A Yes, sir. It is right here.

Q Now, number three is 4-N-13 and that is the Nellie Mace and J. E. Hopkins tract. Would you point that out?

A Yes, it is right here.

Q You are indicating that?

(p. 82) A Yes, it is right here.

Q 2-N-8 is identified as the Tioga Lumber Company tract. Would you point that out?

A Yes, sir.

Q You are pointing that out now?

A Yes.

Q 3-P-10 is the A & R Coal Development Company tract. You are now pointing that out?

A Yes.

Q 3-P-9 is the A & R Coal Development Company tract and you are now pointing that out?

A Yes.

Q 2-L-5 is the M. B. Partners Limited tract and you are now pointing that out?

A Yes.

Q 3-R-7 is the H. R. Dietz tract and you are now pointing that out to the Commission?

A Yes.

Q And tract nine is 3-P/1-6-7-8, the J. N. Tulley tract and would you point that out?

A That is this cluster of tracts here.

Q Now, you may take your seat. I will hand you what has been marked as Exhibit C in the record and is

identified as Eastern Kentucky Energy Corporation properties. Are you (p. 83) familiar with those tracts?

MR. ALSOP: I object to that characterization. It is not in the record. It has not been introduced into evidence.

MR. CALLAGHAN: I didn't say that, did I?

MR. ALSOP: I think you did.

MR. CALLAGHAN: I think I said that it had been marked for identification. Okay, I will ask him this.

BY MR. CALLAGHAN:

Q I will hand you what has been marked as Exhibit C, Eastern Kentucky Energy Corporation's properties, and I will ask you if these are the properties of Eastern Kentucky Energy contained within the green area on your map?

A Yes.

Q They are various tracts, is that right?

A Yes.

Q But they are all contained within that green area?

A Yes.

MR. CALLAGHAN: You may cross-examine.

CROSS-EXAMINATION

BY MR. ALSOP:

Q Mr. Mullenex, when did you do the study on 3-Q-1?

A It was done in 1981.

Q And who did you do that for?

A It was done on behalf of A. T. Massey.

(p. 84) Q What type of study did you do on 3-Q-1?

A It was a reserve evaluation.

Q By reserve evaluation, exactly what did you do?

A Well, we took the information that was available, consisting of drillers' logs and bore holes and evaluated the mineable coal reserves on the property.

Q Do you have that information with you here today?

A No, not in detail.

Q Not in detail?

A No, sir.

Q As I understand on Exhibit A-1 this area right here, that is 3-Q-1?

A Yes, sir. Actually the property included that. It also included—I was mistaken before when I told you that it was all 3-Q-1, because it also included parts of 2-N-8 properties also.

Q So your study included that?

A That is right.

Q You say you had core holes or core borings?

A That is right.

Q When were they done?

A They had been done probably most of them in the late seventies. I don't know the specific dates.

Q Now, the purple area shown there is upper Freeport (p. 85) and upper Kittaning seam?

A Well, yes, that is the interval between the two. In other words, the base of the purple would be the position of the upper Kittaning seam.

Q Do you know the thickness of that co...?

A To recall, it would vary of course, but it was mineable and would probably be in the range of four to six feet in thickness.

Q Do you recall specifically as to whether it was or it wasn't?

A Well, I remember specifically that it was a mineable seam. Yes. Of course, it would vary in thickness across the property.

Q As a matter of fact coal seams do vary across property?

A Certainly.

Q And under geological surveys and based upon the terrain and so forth you may expect a coal seam to be present, but until such time as additional work, such as coal borings are done, you don't know whether that coal seam is in fact present?

A That is correct. You don't have that proof.

Q You do not have that proof?

A No, sir.

Q And coal throughout this area, as it is throughout (p. 86) West Virginia, varies in thickness?

A Yes, sir.

Q Quality?

A Yes, sir.

Q And mineability?

A Certainly.

Q As to the middle Kittaning seam, do you know the thickness of that coal?

A Again, not specifically, but I do recall that it was a mineable seam and again would vary in thickness across the property. It was generally of thickness and mineable quality.

Q And the lower Kittaning seam, do you recall the thickness of that seam?

A Again, it was generally mineable.

Q Generally mineable?

A Yes, sir.

Q But you can't recall the exact thickness?

A No, sir.

Q When did you perform your work for Eastern Kentucky Energy as to the subject tract?

A Well, it was done in '82.

Q It was done prior to the time they purchased it, wasn't it?

A About the time. I'm not sure. I don't know what (p. 87) their purchase date was.

Q You don't recall the purchase date?

A No, sir, I don't. I don't know that I ever knew it.

Q If the purchase date was on or about the 15th day of July, 1982, was your work performed prior or subsequent to that date?

A I'm not sure of the actual date of the completion of the study.

Q And did you submit that study to them in writing?

A Yes.

Q And do you have copies of that?

A I do, but not here.

Q Did you make certain recommendations to them in regard or give them certain opinions in regard to the mineability of the coal upon that property?

A Yes.

Q And I believe the four seams designated on the map are in fact found on the subject tract in mineable quantities, is that correct?

A In mineable quantities on parts of the tract. Not throughout.

Q But a substantial portion of that tract of property contains mineable coal, isn't that right?

A Yes.

(p. 88) Q In fact, does your study not show that the mineable coal on the subject tract is in greater quantities than it is on the adjacent tracts?

A No, it doesn't show that at all.

Q It doesn't show that at all?

A No, sir.

Q As I understand it the area in the orange is the area that is the subject tract?

A Yes, that is right.

Q And on the upper Freeport seam is found on the subject tract, is it not?

A Yes, sir.

Q And in mineable seams?

A Yes, it is mineable.

Q And it is not found on 3-Q-1, is it?

A No.

Q The Freeport and upper Kittaning seams are found on the subject tract in mineable quantities, is it not?

A The upper Kittaning?

Q Yes.

A Yes.

Q And as well as the upper and middle Kittaning?

A Yes.

Q And the middle and lower Kittaning are found in (p. 89) mineable quantities on that tract, isn't that correct?

A Over parts of the tract, yes.

Q And did you perform this reserve study for them when they were exploring the possibility of purchasing this property?

A Yes.

Q And you supplied that information to them?

A Yes, but I don't know the date of the transaction.

Q As to 2-N-8, are there any coal borings on that tract?

A Yes.

Q And what did those coal borings reveal as to 2-N-8?

A Again, they were mineable seams, very much the same mineable seams that occur on the Eastern Kentucky Energy property.

Q And you did that for A. T. Massey?

A Yes.

Q And they were exploring the possibility of purchasing these tracts?

A Yes, I would assume.

Q And to your knowledge those transactions did not occur?

A That is right.

Q As to 2-L-5 and the mineable seams designated as coal distribution as designated on A-1, that is your opinion (p. 90) based upon the geological strata of this property?

A That is right.

Q There are no coal borings to your knowledge and you did not have any?

A No, I did not have access to any.

Q Is is your opinion on the information that you had?

A That is right.

Q And likewise as to 4-N-13, 4-Q-13, 3-R-7 and the 3-P series?

A Yes. Let us take 4-N-13. We did drill a bore hole very near to the boundary between 4-N-13 and the Eastern Kentucky property.

Q By near, what do you mean?

A Well, I would say within 1,000 feet of the property boundary. It was near enough that a projection could be made into the adjacent property.

Q You did not do any study on the adjacent tract?

A No.

Q And you are not aware of any studies made on the adjacent tract?

A No.

Q You did not, did you, on behalf of your client submit any of this information to the assessor of Webster County, did you?

(p. 91) A No.

Q And to your knowledge it has not been submitted, isn't that correct?

A I have no knowledge of that.

Q Mr. Mullenex, did you form an opinion as to the mineable and marketable coal on 3-Q-1?

A Not on that specific tract because that was part of a larger tract which also included 2-N-8 and several other properties too. It was a much larger property and I wouldn't have anything broken out on that small a scale.

Q Did you form an opinion as to the number of mineable and merchantable coal on this subject tract?

A Yes.

Q And what is that opinion?

A About 32,000,000 tons.

Q And that 32,000,000 tons, what was the breakdown as to seams?

A Well, as to seams, about 1.8 million in Freeport.

Q Is the Freeport present in the deep mine or strip mine?

A All of these were treated and considered as strip mine coal.

Q In other words, there was 32,000,000 tons of strip-mine coal located on the subject tract?

A That is right.

(p. 92) Q What about deep mine, did you form any opinion as to whether there was any mineable coal by the deep mine method?

A Well, some of these coals could be recoverable by either method. We treated them as surface mine reserves in our study. We did do some drilling, a very limited amount of drilling, to test deeper seams to determine if there was potential there and on the basis of the initial

drilling we saw no promise for any additional deep mine reserves. The exploration was really stopped at that point, after the initial phase.

Q And that was done prior to the time that you submitted your report to Eastern Kentucky?

A Yes, sir.

Q What other seam or seams did you form an opinion to as to the mineable and marketable coal?

A The upper Kittaning seam would be about 10.8 million, about eight and one-half million in the middle Kittaning and in the seam that would have been referred to as the lower Kittaning by the West Virginia Geological Survey was actually referred to as the Clarion and that was about 10.9 million.

Q What point beneath the surface do you first find the Freeport seam?

A It depends on where you are on the surface because, as that map will show, some places you are below where the seam (p. 93) outcrops and it is above you on the mountainside.

Q Would this be a piece of property which you would designate as being the subject of mountaintop removal?

A Yes, sir.

Q And with the mountaintop removal situation, what would be the average cover on the Freeport seam?

A I don't recall the specifics of how much it was on the average throughout the area.

Q But it is true, is it not, Mr. Mullenex, that the size of the tract we have, being the subject tract and the amount of recoverable coal on the tract, that is an excellent piece of coal property?

A Yes, part of it is. The thing is the area we are looking at that has all of that reserve is the western part of the property. The eastern half of the property has hardly any. To the best of our determination so far there is hardly any reserve on the eastern side of the tract.

Q Per acre on the western side what is the amount of recoverable coal on the subject tract?

A The total tract, I don't know how many acres we would have there in the east versus the west. The tract is what, 7,200 acres?

Q Do you recall what that would be?

A On the grand total we are talking about 4,400 tons (p. 94) per acre.

Q Using the total tract acreage, is that what you are saying?

A Yes.

Q Using the total tract it would average out to 4,400 tons per acre?

A Yes.

Q But you are not able to tell us the number of tons of recoverable coal on the western portion of that tract versus the number of recoverable tons on the eastern part of the subject tract?

A No, I don't have that information with me.

Q It is true, is it not, that Exhibit A-1 depicts that nowhere in the immediate area do you find coal of the quantity and the number of seams as you do on this subject tract?

A That is not so.

Q Would you show me in the other areas where you find it in that quantity, other than the subject tract?

A Okay, this tract here has a larger distribution in terms of total acres.

Q And what tract is that?

A This is 2-L-5.

Q Do you have an opinion as to the number of tons of recoverable coal under the 2-L-5 tract?

(p. 95) A No, I don't.

Q Then how can you say that that tract has more coal, more recoverable coal, than the subject tract?

A I didn't say that it does. I said that it has a larger distribution of acreage of these seams, of the same seams, that were found to be mineable than the Kentucky Energy property. A much larger percentage of this tract's total acreage is covered by these other seams.

Q But there is not the quantity of coal within that area as the subject tract, is there?

A I can't say that.

Q You don't know that, do you?

A I can't say. The thing is it is a smaller tract to begin with.

Q And being a smaller tract that would affect the value, would it not?

A Well, the subject tract is a conglomeration of small tracts.

Q But that conglomeration of tracts was placed together by one common owner?

A Yes, sir.

Q And it would be subject to mining the seams of coal on that conglomerate tract?

A Yes, sir.

(p. 96) Q And based upon the core borings it is your opinion that there is 32 million tons of recoverable coal?

A Yes.

Q And in that area there is not a conglomerate of other tracts that has 32 million tons of recoverable coal, is there?

A I don't know that this tract is owned by a common interest. So, I can't really answer that.

Q You can't really say that is a comparable tract, can you?

A Geologically I can.

Q What do you mean by geologically?

A I mean it has the same coal seams present in the area.

Q It does have or is it based upon your projections that it should have?

MR. CALLAGHAN: Wait a minute, Jack. Give him an opportunity to answer.

THE WITNESS: It does have.

BY MR. ALSOP:

Q It does have?

A It has the same geological strata graphic positions present. Yes.

Q But as to the subject tract those are proven?

A Yes, sir.

Q But you do not have that on 2-L-5?

(p. 97) A That is right.

MR. ALSOP: I have no further questions.

REDIRECT EXAMINATION

BY MR. CALLAGHAN:

Q Mr. Mullenex, there is a total of approximately 7,200 acres of Eastern Kentucky Energy property, is that right?

A Yes, the Eastern Kentucky tract is 7,200 acres.

Q And have you determined approximately how many acres of that 7,200 acres is underlaid with mineable coal?

A About 1,500 acres.

Q About 1,500 acres?

A Yes, sir.

MR. CALLAGHAN: No further questions.

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